First, as the court of appeals recognized, and as respondent concedes (Pet. 14), "the BIA has never used the FFOA to preclude removal" of an alien convicted of a federal offense "since the 1996 changes to the INA" (Pet. App. 11). It therefore cannot be known "what the BIA would do if it were confronted with this situation," or "whether its decision would pass legal muster." *Ibid* If the BIA ultimately decided that it is Section 101(a)(48)(A) rather than the FFOA that governs *federal* convictions, and if courts sustained that decision, there would be no basis for a claim that the FFOA must govern *state* convictions as a matter of equal protection.

There is, moreover, a substantial basis on which the BIA could determine that Section 101(a)(48)(A) governs federal convictions. As Judge Easterbrook has explained, that provision "affects only immigration matters; even if a disposition under [the FFOA] counts as a conviction in immigration law, it would not be a conviction for other purposes, such as firearms disabilities." *Gill* v. *Ashcroft*, 335 F.3d 574, 578 (7th Cir. 2003). Accordingly, Section 101(a)(48)(A) and the FFOA "may coexist, though the former reduces the domain of the latter." *Ibid*. See also *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 331 n.12 (5th Cir. 2004) ("We have substantial doubt whether the FFOA controls over the subsequently enacted §1101(a)(48)(A).").

Second, even assuming that the FFOA would govern *federal* convictions, there is a rational basis for treating *state* convictions differently, and there is consequently no equal protection violation. As Judge Alito has explained, Congress was "[f]amiliar with the operation of the federal criminal justice system," and therefore "could have thought that aliens whose federal charges are dismissed under the FFOA are unlikely to present

a substantial threat of committing subsequent serious crimes." *Acosta* v. *Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003). In contrast, Congress may have been "unfamiliar with the operation of state schemes that resemble the FFOA," and therefore "could have worried that state criminal justice systems, under the pressure created by heavy case loads, might permit dangerous offenders to plead down to simple possession charges and take advantage of those state schemes to escape what is considered a conviction under state law." *Ibid.* Particularly given Congress's broad "power in immigration matters," there "plain[ly]" is a rational basis for the distinction between federal and state convictions. *Ibid.* Accord *Resendiz-Alcaraz* v. *U.S. Attorney General*, 383 F.3d 1262, 1272 (11th Cir. 2004) (endorsing Judge Alito's reasoning); *Madriz-Alvarado*, 383 F.3d at 332 (same).

2. As noted above, the rule that petitioner challenges—that, in light of Section 101(a)(48)(A) of the INA, a state rehabilitative action that does not vacate a conviction on the merits or on a ground related to the violation of a statutory or constitutional right has no bearing on whether an alien has been "convicted" for immigration purposes—was adopted by the BIA in *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999). On petition for review, the BIA's decision in that case was vacated by the Ninth Circuit. *Lujan-Armendariz* v. *INS*, 222 F.3d 728 (2000). The court rejected the INS's argument that Section 101(a)(48)(A) "partially repeal[ed]" the FFOA, *id.* at 743, and then held that, "as a matter of constitutional equal protection," the benefits of the FFOA must be "extended to aliens whose offenses are expunged under state rehabilitative laws, provided that they would have been eligible for relief under the

[FFOA] had their offenses been prosecuted as federal crimes," *id.* at 749.

While the BIA is bound by *Lujan-Armendariz* in the Ninth Circuit, it has made clear that it will continue to apply *Roldan* elsewhere. *In re Salazar-Regino*, 23 I. & N. Dec. 223 (2002). And every other court of appeals to address the question has upheld the BIA's interpretation of Section 101(a)(48)(A). See *Resendiz-Alcaraz*, 383 F.3d at 1266-1272; *Madriz-Alvarado*, 383 F.3d at 330-336; *Acosta*, 341 F.3d at 222-227; *Gill*, 335 F.3d at 575-579; *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 695-699 (8th Cir. 2002); *Herrera-Inirio* v. *INS*, 208 F.3d 299, 304-309 (1st Cir. 2000). Like the decision below, moreover, a number of those court of appeals decisions explicitly reject the equal protection claim that petitioner raises here. See *Resendiz-Alcaraz*, 383 F.3d at 1271-1272; *Madriz-Alvarado*, 383 F.3d at 332-334; *Acosta*, 341 F.3d at 224-227; *Vasquez-Velezmoro*, 281 F.3d at 695-699.

Petitioner asks this Court (Pet. 5-11) to resolve the conflict between those decisions and the Ninth Circuit's decision in *Lujan-Armendariz*. There is no need for the Court to resolve that conflict, however, and even if there were, this would not be an appropriate case in which to do so.

a. As an initial matter, the conflict can be eliminated without this Court's involvement. *Lujan-Armendariz* was the first case in which a court of appeals considered the equal protection claim that petitioner raises here. In the last four years, the Third, Fifth, Seventh, Eighth, and Eleventh Circuits have explicitly disagreed with the Ninth Circuit's decision in that case, see *Resendiz-Alcaraz*, 383 F.3d at 1271; *Madriz-Alvarado*, 383 F.3d at 332; *Acosta*, 341 F.3d at 225; *Gill*, 335 F.3d at 579;

Vasquez-Velezmoro, 281 F.3d at 697, and no circuit has followed it. In light of the subsequent decisions that have rejected *Lujan-Armendariz*, the Ninth Circuit may decide to reconsider the decision en banc.

While the BIA is bound by *Lujan-Armendariz* in cases arising in the Ninth Circuit, and there will therefore be no petitions for review in that circuit in which an alien challenges the rule adopted in *Roldan*, the Ninth Circuit would be in a position to grant hearing or rehearing en banc to consider whether to overrule *Lujan-Armendariz* in a case in which, for example, the alien petitions for review of a decision by the BIA that *Lujan-Armendariz* does not apply because the alien did not satisfy the requirements of the FFOA. Cf. Pet. 13 (citing cases in which the alien "could not meet the FFOA's requirements"). In addition, if the BIA or the Attorney General confronts the question in the future and concludes that the definition of "conviction" in Section 101(a)(48)(A) of the INA supersedes the FFOA in immigration proceedings, the BIA or the Attorney General could choose to apply that considered determination in the Ninth Circuit in order to present an occasion to seek reconsideration of that issue. If the en banc Ninth Circuit did overrule *Lujan-Armendariz*, the circuit conflict would be eliminated.

b. Even assuming that the issue were one that should be resolved by this Court, this would not be an appropriate case in which to do so. The IJ found petitioner removable, not only on the ground that he had been convicted of a drug offense, but also on the ground that he was in the United States without having been admitted or paroled. Pet. App. 16. The BIA and the court of appeals upheld the order of removal, and petitioner seeks this Court's review on only one of the two

grounds for removal. Since, as the court of appeals recognized, the fact that petitioner was not admitted or paroled is "enough in [itself] to support the order of removal" (*id.* at 9), a favorable decision by this Court would have no effect on the outcome of the case: the IJ's order of removal would still be upheld. Contrary to his assertion, therefore, petitioner would have been removed even "had his offense occurred within the Ninth Circuit" (Pet. 6), because, unlike the aliens in *Lujan-Armendariz*, petitioner was not a "legal resident," 222 F.3d at 732, 733, and there was thus an independent basis for his removal. This Court sits "to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

Petitioner denies that he would be removable even if this Court resolved in his favor the question presented in the petition. Pet. 12. He claims that (1) he "had an I-130 family petition approved for his benefit" in 1992; (2) he "possessed a valid social security number and proper employment verification documents"; and (3) "[h]is parents, wife, and child are all United States citizens." *Ibid.*[2] Petitioner cites nothing in the administrative record to support the second claim, however, and the only support he provides for the first and third claims are his own representations to the IJ. Pet. App. 28, 29. In any event, even if all of his claims are true, they do not alter the facts, the truth of which petitioner has never disputed, that demonstrate his removability on the first of the two grounds on which the IJ relied—namely, that he is not a national of the United States; that he is a native and citizen of Mexico; that he arrived in the United

[2] An "I-130 family petition" (Pet. 12) is a visa petition filed on behalf of an alien by a relative who is a lawful permanent resident. See 8 C.F.R. 204.2.

States at an unknown place and time; and that he was not admitted or paroled. *Id.* at 9. In that connection, petitioner's assertion that he has "had his status adjusted" (Pet. 12) is incorrect. As the court of appeals recognized, while petitioner may have *taken steps* to have his status adjusted, "[t]he immigration authorities ultimately denied his application for adjustment." Pet. App. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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